91-377

(1)

No. _____

IN THE

Supreme Court of the United States

October Term, 1991

TYRONE L. FRIESON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In determining whether a convicted defendant is entitled to a reduction in his Base Offense Level for acceptance of responsibility under Section 3E1.1 of the Federal Sentencing Guidelines, is it proper to consider whether that defendant has or has not accepted responsibility for offenses other than the offense of conviction?

II. In determining whether an enhancement of a convicted defendant's Base Offense Level is required under Section 1B1.1 of the Federal Sentencing Guidelines as a consequence of that defendant's role in the offense, should a determination of the number of participants in the offense and the nature of that defendant's participation in the offense be limited to a consideration of the facts and circumstances applicable to the particular offense of conviction, or should a broader range of facts and circumstances be properly considered?

PARTIES BELOW

Besides the Petitioner, Tyrone L. Frieson, several other persons were named as defendants in a thirteen (13) count Indictment, those defendants being: Robert Parker a/k/a Robert Frieson; David Larry Sales a/k/a "Rat"; Irene F. Foye a/k/a "Ba Ba"; Charlene V. Brown; George Q. Carter; Terrance D. Brockner; and, Wynema T. Brown. All defendants, including Petitioner, were named in Count One, which alleged a conspiracy to distribute cocaine base. This count was eventually dismissed as to Petitioner. Petitioner's co-defendants in Count Ten, alleging sale of cocaine base, were Wynema T. Brown and Irene F. Foye. That count was also dismissed. Petitioner entered a plea of guilty to Count Seven in which it was alleged that he had aided and abetted George Q. Carter in making a sale of cocaine base. No other defendants were named in that count. Respondent, United States of America, prosecuted Petitioner and all other defendants on the aforementioned indictment.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tyrone L. Frieson, hereby respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 5, 1991.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is unpublished, and is set forth in the Appendix to this Petition at A1, *infra*. There is no formal opinion of the United States District Court for the Southern District of West Virginia, however, the oral findings and the sentence pronounced by said District Court are set forth in the form of excerpts from the transcript of proceedings set forth in the Appendix at A5, *infra*.

JURISDICTION

Petitioner was prosecuted in the District Court for distributing cocaine base in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2. Jurisdiction of the District Court was premised upon 18 U.S.C. Section 3231. The Court of Appeals affirmed Petitioner's conviction and sentence on June 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

SENTENCING GUIDELINES INVOLVED

Section 3E1.1 of the Federal Sentencing Guidelines provides as follows:

Acceptance of Responsibility

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Section 3B1.1 of the Federal Sentencing Guidelines provides as follows:

Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

At the time of the offense for which Petitioner was sentenced, Section 1B1.3 of the Federal Sentencing Guidelines provided as follows:

> **Relevant Conduct (Factors that Determine the Guideline Range)**
>
> The conduct that is relevant to determining the applicable guidelines range includes that set forth below.
>
> (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility from that offense or that otherwise were in furtherance of that offense;
>
> (2) solely with respect to offenses of a character for which Section 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
>
> (3) all harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;

(4) the defendant's state of mind, intent, motive and purpose in committing the offense; and

(5) any other information specified in the applicable guideline.

(b) *Chapter Four (Criminal History and Criminal Livelihood).* To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.

STATEMENT OF THE CASE

On June 14, 1989, Petitioner, a 25 year old honorably discharged Marine Corps Veteran, was indicted along with several other persons in the Southern District of West Virginia. The Indictment contained thirteen (13) counts and is set forth in the Appendix to this Petition at A10, *infra*. Petitioner was named as a defendant in three (3) counts: Count One, alleging conspiracy to distribute cocaine base; Count Seven, alleging a sale of .46 grams of cocaine base, and; Count Ten, alleging a sale of 4.43 grams of cocaine base. On January 16, 1990, Petitioner entered a plea of guilty to Count Seven of the Indictment in which it was alleged that he and one other person (George Q. Carter) had effectuated a sale of .46 grams of cocaine base in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2. This plea was entered pursuant to a plea agreement which provided for dismissal of Counts One and Ten of the Indictment and required Petitioner to cooperate with the government by providing complete and truthful information regarding any subjects about which government agents might inquire of Petitioner. Under the plea agreement, any information provided by Petitioner in response to such inquiries could not be used against him, but the government reserved the opportunity to use any and all evidence against Petitioner as could be developed from any independent source, and to prosecute Petitioner for any and all other offenses, regardless of whether same pertained to the same subject matter as the inquiries made of Petitioner.

A single interview with Petitioner was conducted, during which he was debriefed by law enforcement officers. At no time did Petitioner deny his culpability with respect to the offense to which he had pleaded.

On March 14, 1990, a presentence report was prepared which considered Petitioner's "relevant conduct" for purposes of sentencing to include distribution of some 234.82 grams of cocaine base, a quantity which would generate a Base Offense Level of 34. The report also recommended an additional four-level upward adjustment for Petitioner's supposed role as an organizer or leader of criminal activity (to wit, a drug distribution scheme) involving five (5) or more participants, thereby raising the Base Offense Level to 38. No downward adjustment was recommended for acceptance of responsibility. The existence of previous misdemeanor convictions placed Petitioner in Criminal History Category II.

Petitioner objected to the presentence report and an evidentiary hearing was conducted. After consideration of the evidence presented, the District Court concluded that Petitioner's "relevant conduct" involved distribution of 132.1 grams of cocaine base resulting in a Base Offense Level of 32. The District Court then went on to find that Petitioner "dealt with a great number of participants, far more than five (5), in the cocaine distribution network he established," which generated a four level enhancement, raising Petitioner's Offense Level to 36. However, the evidence indicated that only the Petitioner and one (1) other co-defendant had participated in the particular offense to which Petitioner had pleaded guilty.

With respect to the question of whether Petitioner had accepted responsibility, there was no question that Petitioner had acknowledged his culpability and accepted responsibility for the conduct comprising the offense of conviction. However, the government claimed that

Petitioner had not been completely forthright and truthful in response to their inquiries as to other criminal conduct not described in the count to which Petitioner pleaded guilty. On this basis, the District Court found that Petitioner was not entitled to a Two Level reduction for acceptance of responsibility.

Sentence was then pronounced with reference to a Base Offense of 36 and Criminal History Category II which yielded a guideline range of 210-262 months. Expressing some anguish as to the severity of the sentence, the District Court imposed 210 months of imprisonment.

On appeal, Petitioner contended, *inter alia*, that any finding as to acceptance of responsibility should properly have been made with reference only to the offense of conviction and that any adjustment for role in the offense should also have been determined with reference only to the offense of conviction. The contentions were rejected and Petitioner's sentence affirmed in an unpublished *per curiam* opinion.

REASONS FOR GRANTING THE PETITION

There is considerable disagreement among the various circuit courts about the proper resolution of the particular questions presented for review in this case. Petitioner respectfully contends that such a conflict among the circuits with respect to such important and recurring issues ought to be conclusively resolved by this Court.

I.

With respect to the requirements for acceptance of responsibility under Section 3E1.1 of the Federal Sentencing Guidelines, the First, Second, Fifth, Ninth and Tenth Circuits hold that a defendant is required only to accept responsibility with respect to the offense for which he is convicted in order to be entitled to a two level reduction of his Base Offense Level pursuant to that Section. *United States v. Perez-Franco,* 873 F.2d 455 (1st Cir. 1989); *United States v. Oliveras,* 905 F.2d 623 (2nd Cir. 1990); *United States v. Santiago,* 906 F.2d 867 (2nd Cir. 1990); *United States v. Piper,* 918 F.2d 839 (9th Cir. 1990); *United States v. Johnson,* 911 F.2d 1394 (10th Cir. 1990). The Fourth Circuit has held that a defendant is required to accept responsibility for "all of his criminal conduct" before he can receive credit for acceptance of responsibility, *United States v. Gordon,* 895 F.2d 932 (4th Cir. 1990). In this regard, the Fourth Circuit gave its holding in *Gordon* controlling effect in the instant case at bar.

In the Fifth Circuit, a defendant must accept responsibility for all "relevant conduct" as defined in Section 1B1.3 of the Federal Sentencing Guidelines in order to receive a two level reduction for acceptance of

responsibility. *United States v. Alfaro,* 919 F.2d 962 (5th Cir. 1990); *United States v. Mourning,* 914 F.2d 699 (5th Cir. 1990); *United States v. Tellez,* 882 F.2d 141 (5th Cir. 1989). The Eleventh Circuit requires acceptance of responsibility for all "related conduct" before a defendant can be deemed entitled to the two level reduction. While this formulation might be interpreted as encompassing only such conduct as is closely related to the facts of the offense of conviction, it appears that the Eleventh Circuit considers "related conduct" to be more or less equivalent to "relevant conduct" as defined in Section 1B1.3. *United States v. Munio,* 909 F.2d 436 (11th Cir. 1990); *United States v. Henry,* 883 F.2d 1010 (11th Cir. 1989).

It appears that the Eighth Circuit has only addressed this matter in a split decision, where the majority resolved the acceptance of responsibility question on the basis that the defendant did not fully perform his obligations under a plea bargain, and was thus properly denied a two level reduction under Section 3E1.1. The dissent, however, forcefully suggested that the question of whether a defendant has met the requirements for acceptance of responsibility under Section 3E1.1 must be determined separately from the question of whether that defendant has fully performed any larger obligations imposed upon him by operation of an existing plea agreement. *United States v. Lawrence,* 918 F.2d 98 (8th Cir. 1990).

The Third and Seventh Circuits do not appear to have yet squarely considered these issues in any cases reported as of this writing. *But cf., United States v. McDowell,* 888 F.2d 285 (3rd Cir. 1989).

The appropriateness of a reduction in offense level for acceptance of responsibility under Section 3E1.1 is a question that arises in virtually every criminal case to which the Federal Sentencing Guidelines are applicable. The division among the circuits as to how this important and recurring question is to be addressed creates just the sort of disparity in sentencing that the Federal Sentencing Guidelines were intended to eliminate. In this regard, the legal and factual posture of the case at bar is such that it could provide this Court with a vehicle for exploring the divergent approaches the circuits have taken with respect to the proper application and interpretation of Section 3E1.1 in order to authoritatively resolve the conflict which presently exists among the circuit courts of appeal with respect to this important and recurring issue.

II.

With respect to adjustments to a defendant's Base Offense Level under Section 3B1.1 of the Federal Sentencing Guidelines for his role in the offense, there has been a divergence of opinion among the circuits. Courts disagree as to whether the adjustment is to be applied solely with reference to conduct comprising the offense of conviction, or by also taking into account all transactions leading up to the offense of conviction, or by taking into account all relevant conduct. The issue has been complicated by the publication of a supposedly "clarifying" amendment to the Introductory Commentary to Chapter 3, Part B of the Federal Sentencing Guidelines, effective November 1, 1990. The offense for which Petitioner was convicted and his sentencing for that offense both occurred prior to November 1, 1990.

Prior to the amendment, the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits held that the sentencing court must focus narrowly on the number of participants and the nature of the defendant's participation in the particular offense of conviction in determining whether an adjustment for that defendant's role in the offense is appropriate or required. *United States v. Lanese,* 890 F.2d 1284 (2nd Cir. 1989); *United States v. Murillo,* 933 F.2d 195 (3rd Cir. 1991); *United States v. Inigo,* 925 F.2d 641 (3rd Cir. 1991); *United States v. Barbontin,* 907 F.2d 1494 (5th Cir. 1990); *United States v. Manthei,* 913 F.2d 1130 (5th Cir. 1990); *United States v. Mourning,* 914 F.2d 699 (5th Cir. 1990); *United States v. Tetzlaff,* 896 F.2d 1071 (7th Cir. 1990); *United States v. Williams,* 879 F.2d 454 (8th Cir. 1989); *United States v. Zweber,* 913 F.2d 705 (9th Cir. 1990); *United States v. Pettit,* 903 F.2d 1336 (10th Cir. 1990); *United States v. Reid,* 911 F.2d 1456 (10th Cir. 1990); *United States v. De LaRosa,* 922 F.2d 675 (11th Cir. 1991); *United States v. Williams,* 891 F.2d 921 (D.C. Cir. 1988). In so holding, these courts considered the language of Section 3B1.1 referring to the defendant's role in "the offense" to be of controlling significance.

This language was not considered at all significant by the Fourth Circuit, which holds that the sentencing court is required to look beyond the offense of conviction and must consider all relevant conduct (as defined in Section 1B1.3 of the Guidelines) in ascertaining the number of participants and the nature of defendant's participation for purposes of making an adjustment for that defendant's role in the offense under Section 3B1.1. *United States v. Daughtrey,* 874 F.2d 213 (4th Cir. 1989); *United States v. Fells,* 920 F.2d 1179 (4th Cir. 1990). The Fourth Circuit did not expressly analyze this

point in rendering its decision in the case at bar. However, in *Fells*, the court gave considerable weight to the supposedly "clarifying" amendment to the Introductory Commentary to Chapter 3, Part B of the Guidelines, which added the following language:

> The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of Section 1B1.3 (Relevant Conduct), *i.e.*, all conduct included under Section 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

The effect of this amendment was not considered in the case at bar, but other courts have interpreted it in different ways. With respect to post-amendment offenses, the Second Circuit has held that it will now consider all relevant conduct for purposes of reviewing the role in the offense adjustments under Section 3B1.1. However, that court suggests that offenses committed prior to the effective date of the amendment might be treated differently. *United States v. Perdomo*, 927 F.2d 111 (2nd Cir. 1991).

The Fifth Circuit has taken a different approach to role in the offense adjustments. Even prior to the amendment in question, the Fifth Circuit began to refine its prior holdings to permit consideration not only of conduct comprising of the offense of conviction, but also all other conduct closely connected with the offense and comprising part of the same transaction or underlying sequence of events in order to determine the number of participants and the nature of the defendant's participation in the offense of conviction. *United States v. Alfara*, 919 F.2d 962 (5th Cir. 1990); *United States v. Villarreal*, 920 F.2d 1218 (5th Cir. 1991). In *United States v. Mir*, 919 F.2d 940 (5th Cir. 1990), the court expressly considered the effect of the aforementioned November 1, 1991 amendment to the commentary but substantially

adhered to its previously evolved position which appears to be midway between its initial holding in *Barbontin, supra* and the position of the Fourth Circuit in *Fells, supra.*

It appears that neither the First Circuit nor the Sixth Circuit have as yet squarely addressed any of these issues. *But cf., United States v. Fuller,* 897 F.2d 1217 (1st Cir. 1990); *United States v. Preakos,* 907 F.2d 7 (1st Cir. 1990); *United States v. McDowell,* 918 F.2d 1004 (1st Cir. 1990); *United States v. Carroll,* 893 F.2d 1502 (6th Cir. 1990).

In the case at bar, Petitioner specifically challenged the propriety of the finding that the offense of conviction involved five or more participants. Petitioner contended that he should not have received a four level upward adjustment under Section 3B1.1 for being the organizer or leader of criminal activity involving five or more participants, where he was convicted for aiding and abetting one (1) other person with respect to a single sale of less than a gram of cocaine base. His specific contentions in this regard were not addressed by the Court below except in the most general terms.

The factual scenario of this case, however, squarely presents an opportunity to authoritatively define the proper scope of conduct to be considered for role in the offense adjustments under Section 3B1.1 with respect to offenses occurring prior to November 1, 1990. In this regard, this case should also present the opportunity to consider the effect of a commentary amendment that is supposedly intended to "clarify" the original language of a particular Guidelines Section, but which, in reality, espouses a completely new interpretation at variance with the express language of the Guidelines Section that it is intended to clarify.

Be that as it may, the existing conflict among the circuits with respect to the proper application and interpretation of Section 3B1.1 promotes the sort of disparity in sentencing that the Federal Sentencing Guidelines were intended to eliminate. The case law on this question is sufficiently well developed to enable this Court to resolve the existing divergence of approach among the circuits in order to achieve the sort of consistency and uniformity in sentencing practices that the Guidelines are designed to effectuate.

CONCLUSION

For these reasons, the Petitioner prays that this Petition for Certiorari be granted with respect to either or both of the questions presented.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Decided June 5, 1991)

[UNPUBLISHED]

No. 90-5650

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TYRONE L. FRIESON, a/k/a Troop,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., District Judge. (CR-89-117-2)

Before HALL and WILKINSON, *Circuit Judges,* and BUTZNER, *Senior Circuit Judge.*

Affirmed by unpublished per curiam opinion.

John F. Potts, Toledo, Ohio, for Appellant. Michael W. Carey, United States Attorney, Jacquelyn I. Custer, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Tyrone L. Frieson pled guilty to one count of distribution of crack cocaine (21 U.S.C. §841). He appeals the sentence he received and we affirm.

Frieson sold crack through runners or middlemen who returned the money to Frieson and were paid by him in money or drugs. Several co-defendants, a confidential informant, and a government agent testified at Frieson's lengthy sentencing hearing.

Frieson first contends that he was improperly denied a reduction in offense level for acceptance of responsibility. This is a factual finding reviewed for clear error. *United States v. White*, 875 F.2d 427, 431 (4th Cir. 1989). Frieson argues that acknowledgement of guilt in the offense of conviction should be sufficient to earn the reduction, and suggests that we should reconsider our holding in *United States v. Gordon*, 895 F.2d 932 (4th Cir.), *cert. denied*, 59 U.S.L.W. 3247 (U.S. 1990), in which we held that a defendant must accept responsibility for all his criminal conduct. We decline to do this. Our review of the sentencing hearing, especially the government's representation about Frieson's reluctance to provide information during his debriefing and Frieson's own statements to the district court, disclose that the district court's factual finding that Frieson had not accepted responsibility for his criminal conduct was not clearly erroneous.

Next Frieson disputes the district court's finding that he was an organizer or leader in a criminal activity involving more than five participants. We also review this factual determination for clear error, *United States v. Sheffer*, 896 F.2d 842, 846 (4th Cir.), *cert. denied*, 59

U.S.L.W. 3246 (U.S. 1990), and find none, because there was evidence of participation by at least five people whose activities were directed by Frieson.

Frieson also maintains on appeal that the district court should have held an evidentiary hearing on the government's use of information about drug amounts in specific transactions which he alleged was first obtained during his debriefing. He argues that his plea agreement and U.S.S.G. §1B1.8 forbid such use in determining the guideline range. At the sentencing hearing, the government informed the district court that it had learned about the transactions and the amounts during interviews with two co-conspirators (Parker and Cunningham) before Frieson decided to plead guilty. Frieson argued that these drug amounts should be excluded from consideration under §1B1.8 because the co-conspirators' testimony was not credible or comprehensible until he corroborated it. The district court explored the issue thoroughly and found that the government had knowledge of the drug amounts before Frieson's debriefing. We cannot say that this factual finding is clearly erroneous.*

Finally, Frieson argues that the district court erred in refusing his request to withdraw his guilty plea during the sentencing hearing. A guilty plea may be withdrawn before sentencing for any "fair and just" reason, and the district court's decision to allow or refuse a withdrawal is reviewed for abuse of discretion. *United States v. Haley,* 784 F.2d 1218 (4th Cir. 1986). Frieson alleged that he

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* Although Frieson asserts on appeal that one of the co-conspirators (Cunningham) denied giving drug amounts to the government until the night before his testimony in the sentencing hearing, his testimony appears to refer to a further discussion of what he had told the government in his previous interview.

had not been aware at the time he entered his plea that conduct outside the count of conviction could be considered in determining his sentence. The district court questioned Frieson and his two attorneys and determined that Frieson's allegations were not credible. We find no abuse of discretion in this decision, especially after a review of the guilty plea hearing at which the district court informed Frieson that relevant conduct outside the count of conviction and outside the indictment could be considered in determining his sentence.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

ORAL FINDINGS AND SENTENCE OF THE UNITED STATES DISTRICT COURT

(April 6, 1990)

Criminal No. 2:89-00117

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,

v.

TYRONE L. FRIESON,
Defendant.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

* * * * *

THE COURT: *** There is a further adjustment upward for role in the offense of 4 levels under Guideline Section 3B1.1. It is apparent that the defendant dealt with a great number of participants, far more than five, in the cocaine distribution network which he established. That would include, of course, Mr. Carter, Mr. Cunningham, Mr. Parker, and the defendant himself, as well as Miss Straughter, Gwen Wiley, and many others, including Larry Sales, Wynema Brown, and as many as five others who are identified at various places in the evidence and the Probation Department's presentence report.

* * * * *

THE COURT: The court finds that all of the conduct which the court has concluded aggregates 132 grams of cocaine base attributable to the defendant in this case arises from the same common scheme or course of conduct as that to which the defendant has pled guilty in this case. Now then, with respect to acceptance of responsibility, let me hear the parties briefly on that matter.

* * * * *

THE COURT: The court has made its findings on the amount of grams of cocaine base involved as relevant conduct and the court has made its findings as well on leadership role of the defendant. On those and any other findings made by the court, have the parties any further reaction to note on the record before the court undertakes to finalize those findings?

MR. WITTENBERG: Just, Your Honor, to reiterate our objections to the readily provable part of the quantity and the 4 points given for leadership role which I believe are contrary to the testimony that Ernest Wilson was the main supplier.

MS. CUSTER: Nothing for the United States, Your Honor.

THE COURT: The court adheres to those findings and those are the findings of the court on those points.

* * * * *

THE COURT: With respect to the question of acceptance of responsibility, the court is compelled to find that the defendant has not accepted responsibility for his misconduct in this case. The court notes in particular that although the defendant did make truthful admission to the authorities of his involvement in the

count to which he entered his plea of guilty, he has consistently been untruthful with the government with respect to related conduct, except in those instances where it has been made plain to him that the government had information to the contrary. However, in a number of other instances involving related conduct, the defendant has continued to be untruthful which continues up to this date when the defendant, notwithstanding the overwhelming evidence before the court of his involvement in related conduct, informed the court that he had not been so involved with either William Cunningham or Robert Parker.

Under those circumstances, even though the defendant has entered a plea of guilty, the defendant is simply not entitled to acceptance of responsibility by reason of his failure to indeed accept responsibility for his misconduct.

I regret that finding because it means that the defendant, through his own actions, has added three and a half years more to his sentence. It is, however, the defendant's own doing and, although I have agonized in an effort to try to find some way to circumvent the defendant's own misconduct before the court committed here today, I simply am unable to do it and be faithful to the law and the guidelines by which the court is bound.

* * * * *

THE COURT: The court would note that the total offense level by its calculations based on the court's findings is 36 with a criminal history of II, yielding a guideline range of 210 to 262 months. I will ask whether the parties are in agreement that that is the appropriate mathematical calculation in view of the court's findings.

MR. WITTENBERG: Yes, Your Honor.

MS. CUSTER: Yes, Your Honor.

THE COURT: If the parties will come forward for sentencing, please.

The court has determined that the charge to which the defendant has pled guilty adequately reflects the seriousness of the actual offense behavior and accepting the plea agreement will not undermine the statutory purpose of sentencing for the reason that the criminal conduct for the defendant charged in the indictment is set forth in the count to which the plea of guilty has been taken and the maximum punishment prescribed by statute for the violation of that count is ample.

The court accepts the plea agreement and finds that agreement adequately protects the rights of the defendant and is in the interest of justice. The court accepts the plea of guilty and adjudges the defendant guilty of one violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2 as charged in count seven of the indictment in this case.

* * * * *

THE COURT: I recognize that this sentence is extremely severe. My personal view is it's unduly severe. But I am limited—

THE DEFENDANT: Yes, sir.

THE COURT: —by what these guidelines require and what the law expects of me. As a consequence, I am going to sentence you to the 210 months, being the minimum range. That is more than adequate to—

THE DEFENDANT: Yes, sir.

THE COURT: —punish you for the several offenses in which you have involved yourself and, more particularly, the offense that you are here for on your plea of guilty. The court finds that minimum appropriate for several reasons, one of which is the fact that you did enter a plea of guilty in the case; the further fact having to do with your age, your service to your country, and the extent of your criminal record which, although of some significance, is not great.

The court further will impose a supervised release term of five years, direct that you make payment of the 50 dollar special assessment in this case, and the court will make as special conditions of your supervised release the 17 conditions that are standard in this district, as well as the payment of that special assessment.

* * * * *

INDICTMENT IN THE UNITED STATES DISTRICT COURT

(Filed June 14, 1989)

Criminal No. CR2:89-00117

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
JUNE 13, 1989, GRAND JURY SESSION
BLUEFIELD

UNITED STATES OF AMERICA,

v.

ROBERT FRIESON
also known as "Rob"
TYRONE L. FRIESON
also known as "Troop"
DAVID LARRY SALES
also known as "Rat"
IRENE F. FOYE
also known as "Ba Ba"
CHARLENE V. BROWN
GEORGE Q. CARTER
TERRANCE D. BROCKMAN
also known as "Terry"
WYNEMA T. BROWN.

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21 U.S.C. §846
21 U.S.C. §845
21 U.S.C. §841(a)(1)
18 U.S.C. §924(c)
18 U.S.C. §2

INDICTMENT

The Grand Jury Charges:

COUNT ONE

From on or about June 1, 1988, to in or about June, 1989, within the Southern District of West Virginia, and elsewhere, the defendants, ROBERT FRIESON, a/k/a "Rob," TYRONE L. FRIESON, a/k/a "Troop," IRENE F. FOYE, a/k/a "BaBa," DAVID LARRY SALES, a/k/a "Rat", CHARLENE V. BROWN, GEORGE Q. CARTER, TERRANCE D. BROCKMAN a/k/a "Terry", and WYNEMA T. BROWN, and other persons whose identities are both known and unknown to the Grand Jury, did unlawfully and knowingly combine, conspire, confederate and agree and have a tacit understanding with each other to commit offenses against the United States, that is, to violate Title 21, United States Code, Section 841(a)(1), that is, unlawfully, knowingly, intentionally, and without authority to distribute, to cause to be distributed, to possess with intent to distribute, and to cause the possession with intent to distribute cocaine, also known as "coke," and cocaine base, also known as "crack" and "rock," Schedule II controlled substances as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), within the Southern District of West Virginia, and elsewhere; in violation of Title 21, United States Code, Section 846.

COUNT TWO

On or about June 1, 1988, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, IRENE F. FOYE, a/k/a "Ba Ba," the defendant, unlawfully, knowingly, and without authority distributed approximately 0.16 grams of cocaine, also known as "coke," a Schedule II

controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for One Hundred Dollars ($100.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

On or about June 24, 1988 at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, DAVID LARRY SALES a/k/a "Rat," the defendant, unlawfully, knowingly, and without authority distributed approximately 3.2 grams of cocaine, also known as "coke," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for Three Hundred Dollars ($300.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

On or about March 18, 1989 at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, TERRANCE D. BROCKMAN a/k/a "Terry," the defendant, unlawfully, knowingly, and without authority distributed approximately 0.07 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for Fifty Dollars ($50.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

On or about March 27, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, GEORGE Q. CARTER, the defendant, unlawfully, knowingly, and without authority distributed approximately .10 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for Fifty Dollars ($50.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT SIX

On or about April 6, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, ROBERT FRIESON a/k/a "Rob," the defendant, unlawfully, knowingly, and without authority distributed approximately 0.72 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for One Hundred Fifty Dollars ($150.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT SEVEN

On or about April 20, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, GEORGE Q. CARTER and TYRONE L. FRIESON a/k/a "Troop," the defendants, aided and abetted by each other, distributed and caused to be distributed approximately

.46 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for One Hundred Dollars ($100.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT EIGHT

On or about April 20, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, TERRANCE D. BROCKMAN a/k/a "Terry," the defendant, unlawfully, knowingly, and without authority distributed approximately .94 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for One Hundred Fifty Dollars ($150.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT NINE

On or about April 21, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, CHARLENE V. BROWN, DAVID LARRY SALES a/k/a "Rat", and IRENE F. FOYE a/k/a "Ba Ba," the defendants, aided and abetted by each other distributed and caused to be distributed approximately 3.52 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for Five Hundred Dollars ($500.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT TEN

On or about April 22, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, TYRONE L. FRIESON a/k/a "Troop", WYNEMA T. BROWN, and IRENE F. FOYE a/k/a "Ba Ba", the defendants, aided and abetted by each other, distributed and caused to be distributed approximately 4.43 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for Nine Hundred Dollars ($900.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT ELEVEN

On or about April 24, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, ROBERT FRIESON a/k/a "Rob", the defendant, unlawfully, knowingly, and without authority distributed approximately .89 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for One Hundred Eighty Dollars ($180.00) in U.S. Currency; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWELVE

On or about June 8, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, DAVID LARRY SALES a/k/a "Rat," the defendant, did unlawfully, knowingly, intentionally, and without authority carry and use a firearm, namely, one (1) semi-automatic pistol,

during and in relation to the commission of drug trafficking crimes, namely, distribution of, possession with intent to distribute, and conspiracy to distribute and to possess with intent to distribute cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in violation of Title 21, United States Code, Sections 841(a)(1) and 846, for which drug trafficking crimes DAVID LARRY SALES, the defendant, may be prosecuted in a Court of the United States; in violation of Title 18, United States Code, Section 924(c).

COUNT THIRTEEN

On or about June 8, 1989, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, DAVID LARRY SALES a/k/a "Rat," and IRENE F. FOYE a/k/a "Ba Ba," the defendants each of whom was at least eighteen years of age, aided and abetted by each other, distributed and caused to be distributed to a person then under twenty-one years of age approximately .11 grams of cocaine base, also known as "crack" and "rock," a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812(c), Schedule II(a)(4), in exchange for One Hundred Fifty Dollars ($150.00) in U.S. Currency; in violation of Title 21, United States Code, Sections 841(a)(1) and 845 and Title 18, United States Code, Section 2.

A True Bill.

/s/ FRANK P. PISARRO
Foreperson

MICHAEL W. CAREY
United States Attorney

By: /s/ JACQUELYN I. CUSTER
Special Assistant United States Attorney

(2)

No. 91-377

In the Supreme Court of the United States

OCTOBER TERM, 1991

TYRONE L. FRIESON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in view of petitioner's untruthful assertions to government officers and the district court regarding "related conduct," the district court properly denied him a reduction in offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1 despite his acknowledgement of culpability for the offense of conviction.

2. Whether the district court properly gave petitioner a four-level increase in his offense level under Sentencing Guidelines § 3B1.1 because of his leadership role in a crack cocaine distribution network involving five or more participants, notwithstanding that the narrow offense of conviction—one count of distribution of crack cocaine—involved fewer than five participants.

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TYRONE L. FRIESON, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the judgment is noted at 934 F.2d 320 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1991. The petition for a writ of certiorari was filed on September 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his plea of guilty in the United States District Court for the Southern District of West Virginia, petitioner was convicted of distributing cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1). The district court sentenced him to 210 months in prison, to be followed by five years of supervised release, and a $10,000 fine. C.A. App. A20-A23. The court of appeals affirmed. Pet. App. A1-A4.

1. The following activities gave rise to a 13-count federal indictment against petitioner and several of his co-conspirators.[1] During an investigation of crack cocaine distribution in Charleston, West Virginia, several informants identified petitioner as a supplier who often worked out of an apartment in a local housing project. He used the apartment as an informal base of operations where drug runners and customers could locate him. Gov't C.A. Br. 8-9.

During the summer and fall of 1988, petitioner supplied Virginia Straughter with crack cocaine to be sold in Charleston, and Straughter gave petitioner half the proceeds of her sales. Petitioner left Charleston periodically to replenish his supply of crack cocaine, and he gave Straughter the names of three persons to contact if she ran out of the drug in his absence. Gov't C.A. Br. 9.

Petitioner sold Irene Foye $100 of crack cocaine for Wynema Brown Hill on at least two occasions. Peti-

[1] The indictment named petitioner and seven others, and it charged conspiracy to distribute controlled substances, multiple substantive distribution offenses, and a firearms offense. Pet. App. A10-A16. Petitioner was named in the conspiracy count and two of the distribution counts. *Id.* at A11, A13-A15. On the government's motion, the district court dismissed the conspiracy count and one distribution count against petitioner at sentencing. C.A. App. A20.

tioner also gave Hill $25 of crack cocaine on another occasion. Gov't C.A. Br. 10. Between December 1988 and April 1989, moreover, a drug runner named George Carter obtained crack cocaine from petitioner approximately 10 to 15 times a day, three or four days a week. *Ibid.*

On April 22, 1989, Pam Hemphill, who was cooperating with law enforcement officers, negotiated with petitioner and Billy Cunningham to purchase $1,000 of crack cocaine. Hemphill made a purchase from Cunningham, who gave the proceeds to petitioner. Gov't C.A. Br. 10-11. Cunningham and his brother, Parker, also sold other packages of crack cocaine for petitioner. Gov't C.A. Br. 11. In addition, Parker once used petitioner's money to purchase 1.5 ounces of crack cocaine for petitioner in Toledo, Ohio. *Ibid.*

2. In the course of petitioner's presentence investigation, he initially refused to acknowledge having given more than a $20 rock of crack cocaine to Straughter. After being confronted with further evidence, however, petitioner admitted the extent of his dealings with her. Gov't C.A. Br. 9-10. At his sentencing hearing, petitioner claimed that he had not had any business dealings with Cunningham or Parker. The district court recessed the proceeding and heard testimony from Cunningham and Parker in which they outlined their dealings with petitioner. In addition, the government introduced a tape recording of the April 22, 1989, transaction involving petitioner, Cunningham, and Hemphill. Petitioner nevertheless continued to deny that he knew anything about Cunningham and Parker. Gov't C.A. Br. 12.

The district court found that petitioner had "dealt with a great number of participants, far more than

five, in the cocaine distribution network which he established." Pet. App. A5. The court therefore held that petitioner's adjusted offense level should be increased four levels under Sentencing Guidelines § 3B1.1(a), which is triggered when "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive."

The district court also found that "although [petitioner] did make truthful admission * * * of his involvement in the count to which he entered his plea of guilty, he has consistently been untruthful * * * with respect to related conduct, except in those instances where it has been made plain to him that the government had information to the contrary." Pet. App. A6-A7. Hence, the court declined to make a downward adjustment in petitioner's offense level under Sentencing Guidelines § 3E1.1, which applies when "the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A4. First, based on "the government's representation about [petitioner's] reluctance to provide information during his debriefing and [petitioner's] own statements to the district court," the court of appeals concluded that the district court had not committed clear error in finding that petitioner had failed to accept responsibility. *Id.* at A2. Second, "because there was evidence of participation by at least five people whose activities were directed by [petitioner]," the court discerned no clear error in the district court's determination that petitioner was an organizer or leader in criminal activity involving five or more participants. *Id.* at A3.

ARGUMENT

1. Petitioner contends that he is entitled to a downward adjustment in his offense level pursuant to Sentencing Guidelines § 3E1.1 because he accepted responsibility for the offense of conviction. Pet. 10-12.

Petitioner does not contest the district court's factual finding that he had "consistently been untruthful with the government with respect to related conduct, except in those instances where it has been made plain to him that the government had information to the contrary." Pet. App. A7. Nor does he dispute the district court's factual determination that, because he continued to maintain that he had not had any involvement with Parker and Cunningham, petitioner was being "untruthful * * * up to this date." *Ibid.* Rather, petitioner argues that his entitlement to an acceptance of responsibility reduction must be evaluated exclusively by reference to his offense of conviction (*i.e.*, the single cocaine base distribution offense charged in Count 7), and not by reference to the other conduct in which he was engaged as part of a common plan or scheme (*i.e.*, his cocaine distribution network). His contention, however, is contrary to the scheme of the Sentencing Guidelines in general and to Guidelines § 3E1.1 in particular.

Petitioner does not dispute that a sentencing court may look beyond the specific offense of conviction in determining the base offense level pursuant to the Guideline for ordinary drug trafficking offenses, Guidelines § 2D1.1. Nonetheless, he argues that a wholly different regime applies when the district court evaluates a claim of acceptance of responsibility under Guidelines § 3E1.1. Pet. 10-12. The Guidelines, however, contradict his contention. Section 1B1.2(b) of the Guidelines explicitly directs courts to

"determine the applicable guideline range in accordance with § 1B1.3." Section 1B1.3, in turn, defines "Relevant Conduct (Factors that Determine the Guideline Range)." With respect to drug distribution and certain other types of offenses, Section 1B1.3 provides that both specific offense characteristics under Chapter 2 (*e.g.*, drug quantity under Guidelines § 2D1.1) and adjustments under Chapter 3 (*e.g.*, a defendant's acceptance of responsibility under Guidelines § 3E1.1) are to be based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Guidelines § 1B1.3(a)(2).[2]

Petitioner's narrow view of Guidelines § 3E1.1 is also at odds with the Guideline itself. First, the application notes to Guidelines § 3E1.1 provide that an "appropriate consideration[]" in determining the Guideline's applicability is a defendant's "voluntary and truthful admission to authorities of involve-

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[2] The application notes to Guidelines § 1B1.2 confirm the Commission's intent in this regard. Application Note 2 explains that, "once it has determined the applicable guideline (*i.e.*, the applicable guideline section from Chapter Two)," the sentencing court must "determine any applicable specific offense characteristics (under that guideline), and any other relevant sentencing factors pursuant to the relevant conduct definition in § 1B1.3." Guidelines § 1B1.2, Application Note 2. Application Note 3 similarly makes clear that "[i]n many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense," such as "when it considers various adjustments." Guidelines § 1B1.2, Application Note 3 (citing Guidelines § 1B1.3 (Relevant Conduct)). Moreover, Guidelines § 1B1.3 itself requires that all relevant conduct be considered "unless otherwise specified." Nothing in Guidelines § 3E1.1 suggests that the sentencing court is forbidden to consider "all relevant conduct" when determining whether the defendant has accepted responsibility for his criminal conduct.

ment in the offense *and related conduct*." Guidelines § 3E1.1, Application Note 1(c) (emphasis added). Second, whereas Guidelines § 3E1.1(a), as originally promulgated, provided for a reduction in offense level if a defendant accepted responsibility for "the offense of conviction," the Commission has amended that Guideline "by deleting 'the offense of conviction' and inserting in lieu thereof 'his criminal conduct.'" Guidelines, App. C.20, amendment 46 (effective Jan. 15, 1988).

As petitioner notes, Pet. 10-11, some courts of appeals have held that it is improper for a sentencing court to consider whether the defendant has accepted responsibility for conduct beyond the offense of conviction. See, *e.g.*, *United States* v. *Piper*, 918 F.2d 839, 840-841 (9th Cir. 1990) (discussing conflict in authority). The conflict between those decisions and the decision in this case, however, does not warrant this Court's review.

A clarifying amendment to Guidelines § 3E1.1, which took effect on November 1, 1990, confirms that a district court's determination on the issue of acceptance of responsibility may take into account conduct beyond the offense of conviction. The amendment deleted Application Note 3, which stated:

> A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.

Guidelines, App. C.196, amendment 351 (effective Nov. 1, 1990). In its place, the amendment inserted a revised Application Note 3, which reads as follows:

> Entry of a plea of guilty prior to the commencement of trial combined with truthful admission

> of involvement in the offense *and related conduct* will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.

Ibid. (emphasis added). This amendment makes clear that, in addition to the defendant's pleading guilty to the offense of conviction *and* admitting "involvement in the offense," the district court may take into account the defendant's "admission of involvement * * * in related conduct." The revision therefore indicates that admissions of "related conduct" encompass more than simply admissions relating to "the offense" itself.

As part of the same November 1990 amendment, moreover, the Commission amended the background commentary to Guidelines § 3E1.1. That commentary had previously explained why a defendant is entitled to more lenient punishment when he or she accepts responsibility "for the offense." It was amended as of November 1990 to explain that leniency is warranted when a defendant has accepted responsibility "for the offense and related conduct." Guidelines, App. C.196, amendment 351 (effective Nov. 1, 1990).

The amendments to the Guidelines leave little room for doubt that Guidelines § 3E1.1 permits the district court to consider related conduct in determining whether to reduce the offense level for acceptance of responsibility. The amendments therefore should eliminate any confusion as to the intended scope of Guidelines § 3E1.1.[3] As a result, the conflict

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[3] It is true that Application Note 1(c) had previously stated that the district court could appropriately consider

among the circuits on this issue is not likely to continue in cases in which defendants are sentenced for offenses committed after the effective date of the November 1990 amendments to Guidelines § 3E1.1. Petitioner has not cited, and we are unaware of, any decision that has applied those amendments and held that a sentencing court may consider only the offense of conviction in deciding whether Guidelines § 3E1.1 applies.[4] Hence, further review of the decision

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"voluntary and truthful admission to authorities of involvement in the offense and related conduct." Guidelines § 3E1.1 Application Note 1(c). The November 1990 clarifying amendment, however, not only reemphasized the relevance of "related conduct" to the application of Guidelines § 3E1.1, but also eliminated any ambiguity arising from the prior background commentary, which had explained the appropriateness of imposing a lesser sentence when a defendant had "demonstrate[d] a recognition and affirmative acceptance of personal responsibility for the offense." Guidelines, App. C.196, amendment 351.

[4] Some decisions have concluded that it would violate the Fifth Amendment to interpret Guidelines § 3E1.1 to require a defendant to accept responsibility for criminal conduct other than that which underlies the offense of conviction. See, *e.g.*, *United States* v. *Oliveras*, 905 F.2d 623, 626-628 (2d Cir. 1990); *United States* v. *Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989). That issue, however, is not presented in this case. Petitioner has not contended that denying him an acceptance of responsibility reduction under the circumstances of this case violated his privilege against compelled self-incrimination. His plea agreement, moreover, expressly provided that "[n]othing contained in any statement or testimony given by defendant pursuant to this agreement or any evidence developed therefrom will be used in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines unless this agreement becomes void due to violation of any of its terms by defendant." C.A. App. A40-A41.

In addition, because petitioner was denied an adjustment based on the district court's conclusion that he had been

below is unwarranted. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991) (because Congress contemplated that the Commission would periodically "make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," this Court will be "more restrained and circumspect" in granting review to resolve such conflicts).

"untruthful," Pet. App. A7, this case is not a good vehicle for addressing the Fifth Amendment implications of Guidelines § 3E1.1. As one court of appeals explained in similar circumstances:

> The district judge made a credibility determination that was not clearly erroneous. We therefore need not reach the fifth amendment issue. Should some future [defendant] demonstrate sincerity and remorse while at the same time he declines to expound upon other criminal conduct because of a concern with self-incrimination, then perhaps the issue will be squarely presented.

United States v. *Taylor*, 937 F.2d 676, 681 (D.C. Cir. 1991); accord *United States* v. *Frierson*, No. 90-3382 (3d Cir. Oct. 1, 1991), slip op. 28-29; cf. *United States* v. *Lawrence*, 918 F.2d 68, 72 (8th Cir. 1990) (obstruction of justice enhancement case). We recognize that two Second Circuit cases cited by petitioner, Pet. 10, invoked the Fifth Amendment in interpreting Guidelines § 3E1.1 narrowly, despite findings that the respective defendants' denials of related conduct were not credible, *United States* v. *Santiago*, 906 F.2d 867, 870, 873 (2d Cir. 1990), or not candid, *Oliveras*, 905 F.2d at 625, 626-632. But as this Court has made clear, "it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969) (footnote omitted). Therefore, even if petitioner had invoked the Fifth Amendment here and had not had his statements expressly immunized pursuant to his plea agreement, the Fifth Amendment issue would not warrant this Court's review.

2. Petitioner next contends that the district court erred in enhancing his offense level based on his leadership role in a cocaine distribution network having more than five participants. Pet. 12-16. The evidence at petitioner's sentencing hearing, however, established that petitioner had a leadership role in a course of criminal activity—supplying crack cocaine—that involved more than five participants. See Gov't C.A. Br. 8-11; C.A. App. A226-A227. Hence, the district court properly found, Pet. App. A5, that petitioner's offense level should be enhanced four levels under Guidelines § 3B1.1(a), which applies "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The court of appeals correctly held, Pet. App. A3, that that finding was not clearly erroneous.

As with his previous claim of error, petitioner does not dispute the factual predicate of the district court's sentencing decision. Rather, he argues that the court should have focused solely upon the offense of conviction, and not upon conduct that was part of the same course of conduct or common scheme or plan, in applying Guidelines § 3B1.1(a). His position, however, is again at odds with the Guidelines.

As noted, adjustments under Chapter 3 of the Guidelines—including role-in-the-offense adjustments—for offenses such as the one in this case are to be based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Guidelines § 1B1.3(a)(2); see also Guidelines § 1B1.2, Application Notes 2, 3. In addition to those general provisions, the introductory commentary to Guidelines, Chapter 3, Part B, includes the caveat:

> The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), *i.e.*, all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

The foregoing passage—which was inserted as a clarifying amendment to take effect as of November 1, 1990, Guidelines, App. C.189, amendment 345—on its face eliminates any doubt that role-in-the-offense adjustments are to be based on all relevant conduct, and not merely the offense of conviction.

As petitioner observes, several other courts of appeals have taken a narrower approach than the one adopted by the court of appeals in this case. See Pet. 13 (citing cases); see also *United States* v. *Fells*, 920 F.2d 1179, 1183-1184 n.6 (4th Cir. 1990) (citing cases differing with the law of the Fourth Circuit), cert. denied, 111 S. Ct. 2831 (1991). Despite that conflict of authority, however, further review is unwarranted because the November 1990 clarifying amendment resolves the issue in a manner that should eliminate that conflict in the future.

Thus, in *United States* v. *Murillo*, 933 F.2d 195, 200 (1991), the Third Circuit held that it would adhere to its narrower view of role-in-the-offense determinations for offenses committed prior to November 1, 1990, but would apply the broader "relevant conduct" standard to all offenses committed thereafter. Similarly, while the Ninth Circuit construed Guidelines § 3B1.1 narrowly in *United States* v. *Zweber*, 913 F.2d 705 (1990), see Pet. 13, that court later relied on the clarifying amendment to disavow what it referred to as "dicta" from *Zweber* and to hold that role adjustments under Guidelines § 3B1.1 are not limited to the offense of conviction.

United States v. *Lillard*, 929 F.2d 500, 503 (9th Cir. 1991); accord *United States* v. *Lanese*, 937 F.2d 54, 56-57 (2d Cir. 1991) (relying on the November 1990 amendment to reject the offense-of-conviction limitation adopted in its prior decision in *United States* v. *Lanese*, 890 F.2d 1284, 1293 (2d Cir. 1989), cert. denied, 110 S.Ct. 2207 (1990)); *United States* v. *Mir*, 919 F.2d 940, 945 (5th Cir. 1990) (citing the clarifying amendment in rejecting the narrow construction of Guidelines § 3B1.1 in *United States* v. *Barbontin*, 907 F.2d 1494 (5th Cir. 1990)).[5] Finally, petitioner has cited, and we are aware of, no case construing the November 1990 amendment in a manner that would restrict a sentencing court to the offense of conviction in making determinations regarding the defendant's role in the offense. For that reason, the conflict among the circuits cited by petitioner is confined to cases arising under the pre-November 1990 version of Section 3B1.1 of the Guidelines, and therefore will

[5] Petitioner argues that, despite the November 1990 amendment, the Fifth Circuit has adhered to a middle position in conflict with the decision below. Pet. 14. In *United States* v. *Rodriguez*, 925 F.2d 107, 110 (1991), however, the Fifth Circuit made clear that in cases such as this one, which are subject to the relevant conduct definition of Guidelines § 1B1.3(a)(2), the sentencing court may take into account "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Because the district court in this case took into account the participants in the cocaine distribution network established by petitioner, and found that all the cocaine base attributable to petitioner arose from a common plan or scheme, Pet. App. A5-A6, it is clear that the role in the offense increase in this case complies with post-amendment Fifth Circuit law.

be of diminishing importance in the future. Further review of this issue is therefore unwarranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991

[6] This Court recently denied certiorari in a case raising the same issue presented here. See *Fells* v. *United States*, 111 S. Ct. 2831 (1991).

U.S. GOVERNMENT PRINTING OFFICE: 1991 — 312-324-45135